

**INCOME TAX CODE AMENDMENTS**

2019 GENERAL SESSION

STATE OF UTAH

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**LONG TITLE****General Description:**

This bill amends corporate franchise and income tax provisions related to a Utah net loss.

**Highlighted Provisions:**

This bill:

- ▶ prohibits a taxpayer from carrying a Utah net loss back to an earlier taxable year;
- ▶ limits the amount of Utah net loss that a taxpayer may carry forward;
- ▶ removes the 15-year time limit for a taxpayer to carry forward a Utah net loss; and
- ▶ makes technical changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

This bill provides retrospective operation.

**Utah Code Sections Affected:**

AMENDS:

**59-7-101**, as last amended by Laws of Utah 2011, Chapter 69

**59-7-110 (Effective 01/01/19)**, as last amended by Laws of Utah 2018, Chapter 456

**59-7-522**, as last amended by Laws of Utah 2015, First Special Session, Chapter 3

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **59-7-101** is amended to read:

**59-7-101. Definitions.**

As used in this chapter:

(1) "Adjusted income" means unadjusted income as modified by Sections 59-7-105 and 59-7-106.

(2) (a) "Affiliated group" means one or more chains of corporations that are connected through stock ownership with a common parent corporation that meet the following

33 requirements:

34 (i) at least 80% of the stock of each of the corporations in the group, excluding the  
35 common parent corporation, is owned by one or more of the other corporations in the group;  
36 and

37 (ii) the common parent directly owns at least 80% of the stock of at least one of the  
38 corporations in the group.

39 (b) "Affiliated group" does not include corporations that are qualified to do business  
40 but are not otherwise doing business in this state.

41 (c) For purposes of this Subsection (2), "stock" does not include nonvoting stock which  
42 is limited and preferred as to dividends.

43 (3) "Apportionable income" means adjusted income less nonbusiness income net of  
44 related expenses, to the extent included in adjusted income.

45 (4) "Apportioned income" means apportionable income multiplied by the  
46 apportionment fraction as determined in Section 59-7-311.

47 (5) "Business income" ~~is as~~ means the same as that term is defined in Section  
48 59-7-302.

49 (6) (a) "Captive real estate investment trust" means a real estate investment trust if:

50 (i) the shares or beneficial interests of the real estate investment trust are not regularly  
51 traded on an established securities market; and

52 (ii) more than 50% of the voting power or value of the shares or beneficial interests of  
53 the real estate investment trust are directly, indirectly, or constructively:

54 (A) owned by a controlling entity of the real estate investment trust; or

55 (B) controlled by a controlling entity of the real estate investment trust.

56 (b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the  
57 commission may make rules defining "established securities market."

58 (7) (a) "Common ownership" means the direct or indirect control or ownership of more  
59 than 50% of the outstanding voting stock of:

60 (i) a parent-subsidary controlled group as defined in Section 1563, Internal Revenue  
61 Code, except that 50% shall be substituted for 80%;

62 (ii) a brother-sister controlled group as defined in Section 1563, Internal Revenue  
63 Code; or

(iii) three or more corporations each of which is a member of a group of corporations described in Subsection (2)(a)(i) or (ii), and one of which is:

(A) a common parent corporation included in a group of corporations described in Subsection (2)(a)(i); and

(B) included in a group of corporations described in Subsection (2)(a)(ii).

(b) Ownership of outstanding voting stock shall be determined by Section 1563, Internal Revenue Code.

(8) (a) "Controlling entity of a captive real estate investment trust" means an entity that:

(i) is treated as an association taxable as a corporation under the Internal Revenue Code;

(ii) is not exempt from federal income taxation under Section 501(a), Internal Revenue Code; and

(iii) directly, indirectly, or constructively holds more than 50% of:

(A) the voting power of a captive real estate investment trust; or

(B) the value of the shares or beneficial interests of a captive real estate investment trust.

(b) "Controlling entity of a captive real estate investment trust" does not include:

(i) a real estate investment trust, except for a captive real estate investment trust;

(ii) a qualified real estate investment subsidiary described in Section 856(i), Internal Revenue Code, except for a qualified real estate investment trust subsidiary of a captive real estate investment trust; or

(iii) a foreign real estate investment trust.

(c) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules defining "established securities market."

(9) "Corporate return" or "return" includes a combined report.

(10) "Corporation" includes:

(a) entities defined as corporations under Sections 7701(a) and 7704, Internal Revenue Code; and

(b) other organizations that are taxed as corporations for federal income tax purposes under the Internal Revenue Code.

(11) "Dividend" means any distribution, including money or other type of property, made by a corporation to its shareholders out of its earnings or profits accumulated after December 31, 1930.

(12) (a) "Doing business" includes any transaction in the course of its business by a domestic corporation, or by a foreign corporation qualified to do or doing intrastate business in this state.

(b) Except as provided in Subsection 59-7-102(3), "doing business" includes:

(i) the right to do business through incorporation or qualification;

(ii) the owning, renting, or leasing of real or personal property within this state; and

(iii) the participation in joint ventures, working and operating agreements, the performance of which takes place in this state.

(13) "Domestic corporation" means a corporation that is incorporated or organized under the laws of this state.

(14) (a) "Farmers' cooperative" means an association, corporation, or other organization that is:

(i) (A) an association, corporation, or other organization of~~[-(F)]~~ farmers~~[-]~~ or ~~[(H)]~~ fruit growers; or

(B) an association, corporation, or other organization that is similar to an association, corporation, or organization described in Subsection (14)(a)(i)(A); and

(ii) organized and operated on a cooperative basis to:

(A) (I) market the products of members of the cooperative or the products of other producers; and

(II) return to the members of the cooperative or other producers the proceeds of sales less necessary marketing expenses on the basis of the quantity of the products of a member or producer or the value of the products of a member or producer; or

(B) (I) purchase supplies and equipment for the use of members of the cooperative or other persons; and

(II) turn over the supplies and equipment described in Subsection (14)(a)(ii)(B)(I) at actual costs plus necessary expenses to the members of the cooperative or other persons.

(b) (i) Subject to Subsection (14)(b)(ii), for purposes of this Subsection (14), the commission by rule, made in accordance with Title 63G, Chapter 3, Utah Administrative

126 Rulemaking Act, shall define:

127 (A) the terms~~[-(B)]~~ "member"~~[;]~~ and ~~[(H)]~~ "producer"; and

128 (B) what constitutes an association, corporation, or other organization that is similar to  
129 an association, corporation, or organization described in Subsection (14)(a)(i)(A).

130 (ii) The rules made under this Subsection (14)(b) shall be consistent with the filing  
131 requirements under federal law for a farmers' cooperative.

132 (15) "Foreign corporation" means a corporation that is not incorporated or organized  
133 under the laws of this state.

134 (16) (a) "Foreign operating company" means a corporation ~~[if]~~ that:

135 (i) ~~[the corporation]~~ is incorporated in the United States;

136 (ii) conducts at least 80% of the corporation's business activity, as determined under  
137 Section 59-7-401, ~~[is conducted]~~ outside the United States; and

138 (iii) as calculated in accordance with Part 3, Allocation and Apportionment of Income -  
139 Utah UDITPA Provisions, ~~[the corporation]~~ has:

140 (A) at least \$1,000,000 of payroll located outside the United States; and

141 (B) at least \$2,000,000 of property located outside the United States.

142 (b) "Foreign operating company" does not include a corporation that qualifies for the  
143 Puerto Rico and possession tax credit as provided in Section 936, Internal Revenue Code.

144 (17) (a) "Foreign real estate investment trust" means:

145 (i) a business entity organized outside the laws of the United States if:

146 (A) at least 75% of the business entity's total asset value at the close of the business  
147 entity's taxable year is represented by:

148 (I) real estate assets, as defined in Section 856(c)(5)(B), Internal Revenue Code;

149 (II) cash or cash equivalents; or

150 (III) one or more securities issued or guaranteed by the United States;

151 (B) the business entity is:

152 (I) not subject to income taxation:

153 (Aa) on amounts distributed to the business entity's beneficial owners; and

154 (Bb) in the jurisdiction in which the business entity is organized; or

155 (II) exempt from income taxation on an entity level in the jurisdiction in which the  
156 business entity is organized;

(C) the business entity distributes at least 85% of the business entity's taxable income, as computed in the jurisdiction in which the business entity is organized, to the holders of the business entity's:

(I) shares or beneficial interests; and

(II) on an annual basis;

(D) (I) not more than 10% of the following is held directly, indirectly, or constructively by a single person:

(Aa) the voting power of the business entity; or

(Bb) the value of the shares or beneficial interests of the business entity; or

(II) the shares of the business entity are regularly traded on an established securities market; and

(E) the business entity is organized in a country that has a tax treaty with the United States; or

(ii) a listed Australian property trust.

(b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules defining:

(i) "cash or cash equivalents";

(ii) "established securities market"; or

(iii) "listed Australian property trust."

(18) "Income" includes losses.

(19) "Internal Revenue Code" means Title 26 of the United States Code as effective during the year in which Utah taxable income is determined.

(20) "Nonbusiness income" ~~is as~~ means the same as that term is defined in Section 59-7-302.

(21) "Real estate investment trust" ~~is as~~ means the same as that term is defined in Section 856, Internal Revenue Code.

(22) "Related expenses" means:

(a) expenses directly attributable to nonbusiness income; and

(b) the portion of interest or other expense indirectly attributable to both nonbusiness and business income ~~[which]~~ that bears the same ratio to the aggregate amount of such interest or other expense, determined without regard to this Subsection (22), as the average amount of

188 the asset producing the nonbusiness income bears to the average amount of all assets of the  
189 taxpayer within the taxable year.

190 ~~[(24)]~~ (23) "S corporation" means an S corporation as defined in Section 1361, Internal  
191 Revenue Code.

192 ~~[(23)]~~ (24) "Safe harbor lease" means a lease that qualified as a safe harbor lease under  
193 Section 168, Internal Revenue Code.

194 (25) "State of the United States" includes any of the 50 states or the District of  
195 Columbia.

196 (26) (a) "Taxable year" means the calendar year or the fiscal year ending during such  
197 calendar year upon the basis of which the adjusted income is computed.

198 (b) In the case of a return made for a fractional part of a year under this chapter or  
199 under rules prescribed by the commission, "taxable year" includes the period for which such  
200 return is made.

201 (27) "Taxpayer" means any corporation subject to the tax imposed by this chapter.

202 (28) "Threshold level of business activity" means business activity in the United States  
203 equal to or greater than 20% of the corporation's total business activity as determined under  
204 Section 59-7-401.

205 (29) "Unadjusted income" means federal taxable income as determined on a separate  
206 return basis before intercompany eliminations as determined by the Internal Revenue Code,  
207 before the net operating loss deduction and special deductions for dividends received.

208 (30) (a) "Unitary group" means a group of corporations that:

209 (i) are related through common ownership; and

210 (ii) by a preponderance of the evidence as determined by a court of competent  
211 jurisdiction or the commission, are economically interdependent with one another as  
212 demonstrated by the following factors:

213 (A) centralized management;

214 (B) functional integration; and

215 (C) economies of scale.

216 (b) "Unitary group" includes a captive real estate investment trust.

217 (c) "Unitary group" does not include an S corporation.

218 (31) "United States" includes the 50 states and the District of Columbia.

(32) "Utah net loss" means the current year Utah taxable income before Utah net loss deduction, if determined to be less than zero.

(33) "Utah net loss deduction" means the amount of Utah net losses from other taxable years that ~~[may be carried back or carried]~~ a taxpayer may carry forward to the current taxable year in accordance with Section 59-7-110.

(34) (a) "Utah taxable income" means Utah taxable income before net loss deduction less Utah net loss deduction.

(b) "Utah taxable income" includes income from tangible or intangible property located or having situs in this state, regardless of whether carried on in intrastate, interstate, or foreign commerce.

(35) "Utah taxable income before net loss deduction" means apportioned income plus nonbusiness income allocable to Utah net of related expenses.

(36) (a) "Water's edge combined report" means a report combining the income and activities of:

(i) all members of a unitary group that are:

(A) corporations organized or incorporated in the United States, including those corporations qualifying for the Puerto Rico and Possession Tax Credit as provided in Section 936, Internal Revenue Code, in accordance with Subsection (36)(b); and

(B) corporations organized or incorporated outside of the United States meeting the threshold level of business activity; and

(ii) an affiliated group electing to file a water's edge combined report under Subsection 59-7-402(2).

(b) There is a rebuttable presumption that a corporation which qualifies for the Puerto Rico and possession tax credit provided in Section 936, Internal Revenue Code, is part of a unitary group.

(37) "Worldwide combined report" means the combination of the income and activities of all members of a unitary group irrespective of the country in which the corporations are incorporated or conduct business activity.

Section 2. Section **59-7-110 (Effective 01/01/19)** is amended to read:

**59-7-110 (Effective 01/01/19). Utah net loss -- Carryforward and carryback -- Deduction.**



(1) A taxpayer shall determine the amount of Utah net loss that the taxpayer may carry ~~[back or]~~ forward to offset income of another taxable year as provided in this section.

(2) ~~[(a)]~~ Subject to the other provisions of this section, a taxpayer ~~[may]~~:

~~[(i) carry back a Utah net loss from a taxable year for three taxable years preceding the taxable year of the loss; and]~~

~~[(ii) (a) may carry forward a Utah net loss from a taxable year [for 15 taxable years following the taxable year of the loss.] to a future taxable year; and]~~

~~[(b) If a taxpayer elects to forego the federal net operating loss carryback, the taxpayer may not carry back a Utah net loss unless the taxpayer makes an election for state purposes.]~~

(b) may not carry back a Utah net loss from a taxable year.

(3) A taxpayer that carries forward a Utah net loss shall carry forward the Utah net loss to the earliest eligible year for which the Utah taxable income before net loss deduction, minus Utah net losses from previous years that a taxpayer applied or was required to apply to offset income, is not less than zero.

(4) (a) ~~[Except as provided in]~~ Subject to Subsection (4)(b), the amount of Utah net loss that a taxpayer may carry to the year identified in Subsection (3) is the lesser of:

(i) the remaining Utah net loss after deduction of any amounts of the Utah net loss that a taxpayer carried to previous years; or

(ii) the remaining Utah taxable income before net loss deduction of the year identified in Subsection (3) after deduction of Utah net losses from previous years that a taxpayer carried or was required to carry to the year identified in Subsection (3).

~~[(b) (i) The amount of Utah net loss that a taxpayer carries back from a taxable year may not exceed \$1,000,000 in Utah taxable income for each return filed under this chapter in a taxable year.]~~

~~[(ii) A taxpayer may carry forward a Utah net loss in excess of \$1,000,000.]~~

(b) (i) The amount of Utah net loss that a taxpayer may carry forward to a taxable year may not exceed 80% of Utah taxable income computed without regard to the deduction allowable under this section.

~~[(iii) (ii)]~~ (ii) A taxpayer may carry a remaining Utah net loss to one or more taxable years in accordance with this section.

(5) (a) (i) Subject to Subsection (5)(a)(ii), a corporation acquiring the assets or stock of

another corporation may not deduct any net loss incurred by the acquired corporation prior to the date of acquisition.

(ii) Subsection (5)(a)(i) does not apply if the only change in the corporation is that of the state of incorporation.

(b) An acquired corporation may deduct the acquired corporation's net losses incurred before the date of acquisition against the acquired corporation's separate income as calculated under Subsections (6) and (7) if the acquired corporation has continued to carry on a trade or business substantially the same as that conducted before the acquisition.

(6) For purposes of Subsection (5)(b), the amount of net loss an acquired corporation that is acquired by a unitary group may deduct is calculated by:

(a) subject to Subsection (7):

(i) except as provided in Subsection (6)(a)(ii), calculating the sum of:

(A) an amount determined by dividing the average value of the acquired corporation's real and tangible personal property owned or rented and used in this state during the taxable year by the average value of all of the unitary group's real and tangible personal property owned or rented and used during the taxable year;

(B) an amount determined by dividing the total amount paid in this state during the taxable year by the acquired corporation for compensation by the total compensation paid everywhere by the unitary group during the taxable year; and

(C) an amount determined by:

(I) dividing the total sales of the acquired corporation in this state during the taxable year by the total sales of the unitary group everywhere during the taxable year; and

(II) if the unitary group elects or is required to calculate the fraction for apportioning business income to this state using the method described in Subsection 59-7-311(4) in taxable year 2019 or taxable year 2020, multiplying the amount calculated under Subsection (6)(a)(i)(C)(I) by, for the taxable year 2019, four, or, for the taxable year 2020, eight; or

(ii) if the unitary group is required or elects to calculate the fraction for apportioning business income to this state using the method described in Subsection 59-7-311(2), calculating an amount determined by dividing the total sales of the acquired corporation in this state during the taxable year by the total sales of the unitary group everywhere during the taxable year;

(b) dividing the amount calculated under Subsection (6)(a) by the same denominator of

the fraction the unitary group uses to apportion business income to this state for that taxable year in accordance with Section 59-7-311;

(c) multiplying the amount calculated under Subsection (6)(b) by the business income of the unitary group for the taxable year that is subject to apportionment under Section 59-7-311; and

(d) calculating the sum of:

(i) the amount calculated under Subsection (6)(c); and

(ii) the following amounts allocable to the acquired corporation for the taxable year:

(A) nonbusiness income allocable to this state; or

(B) nonbusiness loss allocable to this state.

(7) The amounts calculated under Subsection (6)(a) shall be derived in the same manner as those amounts are derived for purposes of apportioning the unitary group's business income before deducting the net loss, including a modification made in accordance with Section 59-7-320.

Section 3. Section **59-7-522** is amended to read:

**59-7-522. Overpayments.**

(1) As used in this section, "overpayment" means the same as that term is defined in Section 59-1-1409.

(2) (a) Subject to Subsection (2)(b), a claim for credit or refund of an overpayment that is attributable to a Utah net loss [~~carry back or~~] carry forward shall be filed within three years from the due date of the return for the taxable year of the Utah net loss.

(b) The three-year period described in Subsection (2)(a) shall be extended by any extension of time provided in statute for filing the return described in Subsection (2)(a).

(3) The commission shall make a credit against or refund of any overpayment of a tax under this chapter for a taxable year if, in accordance with Section 59-7-519:

(a) (i) a corporation agrees with the commissioner of internal revenue for an extension, or a renewal of an extension, of the period for proposing and assessing a deficiency in federal income tax for that taxable year; or

(ii) there is a change in or correction of federal taxable income for that taxable year;

and

(b) the corporation files a claim for the credit or refund before the expiration of the

343 time period within which the commission may assess a deficiency.

344 (4) The commission shall make a credit or refund within a 30-day period after the day  
345 on which a court's decision to require the commission to credit or refund the amount of an  
346 overpayment to a taxpayer is final.

347 Section 4. **Retrospective operation.**

348 This bill has retrospective operation for a taxable year beginning on or after January 1,  
349 2019.